United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

76-4278

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 76-4278

REA EXPRESS, INC., BANKRUPT,
C. ORVIS SOWERWINE, TRUSTEE IN
BANKRUPTCY,

Petitioners,

BROTHERHOOD OF RAILWAY, AIRLINE AND
STEAMSHIP CLERKS, FREIGHT HANDLERS,
EXPRESS AND STATION EMPLOYES,

Intervenor,

v.

UNITED STATES AND INTERSTATE COMMERCE
COMMISSION,

Respondents.

On Petition To Review Orders Of The Inter-
state Commerce Commission

BRIEF OF INTERVENOR BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS

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ISSUES PRESENTED*

In the opinion of intervenor Brotherhood of Railway and Airline Clerks, the following issues are presented by this review proceeding:

1. Did the Interstate Commerce Commission deprive REA and the public of due process of law when it failed to consider all elements of the National Transportation Policy and when it denied REA the right to litigate issues which the Commission subsequently concluded justified both dismissing REA's application and revoking its temporary authority?

2. Did the Interstate Commerce Commission violate 5 U.S.C. §558 when it failed to provide prior notice of violations and failed to give the alleged offender an opportunity to remedy those violations before revoking REA's temporary authority?

3. Whether the Commission's order constituted an impermissible penalty, which is unjust and unreasonable in consequences, when it dismissed REA's appliclation for permanent authority and revoked REA's temporary authority as a penalty for the isolated violations of REXCO, when the alleged violations werevoluntarily stopped before the effective date of the cease and desist order, and when that penalty destroyed the principal remaining asset of a bankrupt thereby placing in serious jeopardy the substantial interest of some 15,000 priority creditors/employees and destroyed their opportunity for reemployment?

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* This case has not previously been before this Court except on a motion for a stay.

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BRIEF OF INTERVENOR BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS

On December 17, 1976, REA Express, Inc., Bankrupt, and C. Orvis Sowerwine, Trustee in Bankruptcy [hereinafter, "REA"], petitioned this Court for review of the report and order of the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] in Docket No. MC-C-8862, Brada Miller Freight Systems, Inc., et al. v. Rexco, Inc. and REA Express, Inc., decided November 17, 1976, and served November 19, 1976. The Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes [hereinafter, "BRAC"] filed a motion on

December 17, 1976, for leave to intervene on behalf of petitioner, and on December 28, 1976, that motion was granted by this Court.

By order of January 5, 1977, this Court granted petitioners a stay of the Commission's order pending judicial review; by stipulation judicial review was delayed pending Commission action on petitions for reconsideration and/or rehearing.

On January 27, 1977, and by order served January 28, 1977, the Commission denied all motions to intervene and petitions for reconsideration and/or rehearing. Petitioner REA has moved to amend its petition for review to include this order. On February 23, 1977, this Court granted that motion.

BRAC's intervention herein is limited to review of the Commission's dismissal of REA's application for permanent authority in Docket No. MC-66562 (Sub-No. 2345)(Part No. 181) and the revocation of REA's temporary authority as granted by the Commission's order of June 3, 1968, and as extended in Docket No. MC-66562 (Sub-No. 2308 TA).

A. Interest Of Intervenor

As the duly designated representative, under the Railway Labor Act, as amended, 45 U.S.C. §151, et seq., of the vast majority of REA employees, BRAC represents the interests of some 15,000 furloughed employees. Since REA's petition for an arrangement under Chapter XI of the Bankruptcy Act, 11 U.S.C. §701, et seq., on February 18, 1975, proceedings have been directed toward continuation of an express operation which would reemploy as many as possible of those now unemployed individuals; or toward a reorganization of REA itself so that the carrier may provide express service employing the individuals involved. At this time, these 15,000 individuals represented by BRAC remain REA's priority creditors.

Since the temporary authorities represent the principal asset of the Bankrupt's estate, these employees have a substantial interest at stake.[1/] Revocation of the temporary authorities totally precludes the Trustee from realizing on this asset for the benefit of creditors, including employees, or utilizing this asset to bring about an express operation employing many of these individuals. Since many of these employees are past the age of 50 and have spent most of their adult life as REA employees, such revocation effectively deprives them of reemployment opportunities other than by a rejuvenated express operation.

STATEMENT OF THE CASE

A. Procedural History

By separate complaints filed November 24, 1975, November 26, 1975, December 5, 1975, and December 11, 1975, Brada Miller Freight Systems, Inc., Schneider Transport, Inc., American Trucking Associations, Inc., and Associated Truck Lines, Inc., et al., respectively, sought a cease and desist order against alleged unlawful operations of REA as committed by its REXCO Division. In addition, the American Trucking Associations, Inc. [hereinafter, "ATA"], filed a petition on December 1, 1975, seeking dismissal of REA's pending application for permanent authority designated as MC-66562 (Sub-No. 2314) and cancellation of REA's temporary authority granted in MC-66562 (Sub-No. 2308 TA).

These proceedings were consolidated by the order of the Commission of April 5, 1976, and hearings were conducted from August 30, 1976, until

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1/ Although minor operating authorities still exist, the HUB authority [(Sub-No. 2345)(Part No. 181) and (Sub-No. 2308 TA)] constitutes the mainline authority around which virtually the entire REA surface operation for the last eight years has been structured.

September 22, 1976. The Commission reached a decision on November 17, 1976, and served its report and order on November 19, 1976, entering a cease and desist order, dismissing the application for non-prosecution, and cancelling and revoking the temporary authority. It denied petitions for intervention and reconsideration on January 27, 1977.

BRAC was never served with a copy of the complaints or petitions in these proceedings. It learned of the complaints only through statements by other parties. Shortly before the hearings were conducted, BRAC was advised that the issues would be limited to alleged violations by REXCO. Since BRAC was unaware of facts surrounding the specific acts of alleged misconduct by REXCO, BRAC decided intervention would be unnecessary at that stage of the proceedings. BRAC was completely unaware that all of REA's certificates could be revoked and all reemployment prospects of the employees destroyed in such proceedings.

As soon as BRAC became aware of the full ramifications of this proceeding, it acted to intervene. On December 7, 1976, BRAC filed with the Commission a petition and motion to intervene under Rule 72(b) of the General Rules of Practice, and a petition for modification of the effective date of the order and for reconsideration and/or rehearing or further hearing. On January 27, 1977, and by order served January 28, 1977, the Commission denied all the petitions and motions of BRAC. 2/

2/ A separate petition to review the denial of BRAC intervention by the Commission is under consideration. The order came too late to file such a petition and consolidate it herein within the stipulated briefing schedule. The validity of the Commission's denial is irrelevant to the BRAC position in the present case in support of the Trustee's petition for review.

B. Proceedings Before the Administrative Law Judge

In its petition of December 1, 1975, designated as MC-66562 (Sub-No. 2345)(Part No. 181) and (Sub-No. 2308 TA), the ATA sought dismissal of REA's permanent authority application (Sub-No. 2345)(Part No. 181) and cancellation of REA's temporary authority (Sub-No. 2308 TA). The premise of the petition was restricted to allegations of lack of action, lack of prosecution, and a failure to meet the requirements of "Rule 247(f) of the special rules governing applications for operating authority [which] contemplates the prompt prosecution of such applications or their withdrawal and/or dismissal." ATA Petition, pp. 6-7; see also, Exhibit 13, p. 5.

ATA introduced four exhibits during the consolidated administrative hearing. These were: (1) Exhibit #2, REA Application for Temporary Authority No. 2308 TA (see Tr. 23, 38); (2) Exhibit #3, REA Application for Temporary Authority Sub-No. 2337 TA (see Tr. 24, 38); (3) Exhibit #4, REA Reply in Sub-No. 2337 TA (see Tr. 24, 38); and (4) Exhibit #5, REA Petition for Reconsideration in Sub-No. 2337 TA (see Tr. 34, 38). ATA did not provide witness testimony; rather, it relied entirely on the exhibits.

Statements by counsel for ATA, Mr. Peterman, clearly shows that ATA's petition was based on arguments that: (1) REA authority had been outstanding for eight years (Tr. 342); (2) REA never prosecuted (Tr. 342); (3) REA had repudiated its temporary authority when it filed for new temporary authority in Sub-No. 2337 TA (Tr. 2454-56); and (4) REA was "unfit" for temporary authority due to REXCO's alleged violations (Tr. 342). ATA relied solely upon the pleadings and procedural history to support these assertions and allegations.

REA did not introduce evidence as to public convenience and necessity, or fitness, or the ability of REA to meet those needs, since Administrative Law Judge Beddow ruled that such matters were not at issue in the proceeding with respect to dismissal of the application and revocation of temporary authority (Tr. 346, 648), and that the issues would be limited strictly to those raised by the petition (Tr. 346). Such rulings were made in response to REA counsel's repeated requests for a definition of the issues and for notice as to litigable issues. (See Tr. 340-41; 344-46.)

In Exhibit 13 introduced during the hearing (REA Objection to Admissibility and Motion to Strike), petitioner clearly indicated its intent and the intent of its possible successor in interest, Alltrans Express U.S.A., Inc., to prosecute its application for permanent authority. (See pp. 5-6.) Likewise, counsel for intervenor Alltrans Express U.S.A., Inc. [hereinafter, "Alltrans"], stated that REA had never delayed the application proceeding nor violated Rule 247(f) of the Special Rules of Practice and read into the record the docket history of the application for permanent authority (Sub-No. 2345)(Part 181) which: (1) indicated specifically REA's willingness to prosecute the application; and (2) indicated the Commission's own failure to set a hearing date despite REA's readiness and several intermittent orders regarding intervention and consolidation. (See Tr. 2452-53.)

C. Commission Findings

Despite the rulings of the Administrative Law Judge to the contrary, the lack of supporting evidence, and the fact that such issues were beyond those framed by the complaint, the Commission based two of its three grounds

for dismissing REA's application on findings with respect to issues of public convenience and necessity, public interest, and fitness and ability of REA to prosecute with any likelihood of resulting in a feasible operation. (See Report and Order, November 17, 1976, p. 20, 22-23.) As a third ground for dismissal, the Commission construed Rule 247(f) of the General Rules of Practice as implying an "affirmative duty" requiring petitioner to prosecute or else seek dismissal, and found that REA had failed to meet such affirmative duty because REA had not moved the application forward during the eight years it had been on the docket. (See Report and Order, supra, at 20, 22-23.)

Having dismissed the REA application for permanent authority, the Commission revoked the REA temporary authority on two independent grounds: (1) that the temporary authority automatically terminated by its own terms with the dismissal of the corresponding application; and/or (2) a finding of good cause for revocation under Section 210(a) of the Interstate Commerce Act, 49 U.S.C. §310(a). In finding good cause to revoke the temporary authority, the Commission once again relied on findings with respect to issues which were not litigated at the hearings, such as capability to perform express service, fitness, and feasibility of any possible operations (See Report and Order, supra, at 20-22), and to which petitioner did not have the opportunity to present rebuttal evidence, as they were beyond the issues framed in the petition.

The Commission did not take evidence, make findings, nor consider and weigh the interests of employees, as required by the National Transportation Policy.

ARGUMENT

I

Due Process Rights Of Petitioner REA Were Violated By The Commission's Adverse Findings On Issues Which Were Not Litigated And To Which Petitioner Did Not Have An Opportunity To Present Evidence, And By The Commission's Failure To Collect And To Consider Facts With Respect To Employee Interests As Required By Congress In The National Transportation Policy, 49 U.S.C. Preceding Section 1

The Supreme Court of the United States has held that before a Commission order can become effective, petitioners must be afforded a full and fair "hearing" -- i.e., an opportunity to be heard -- comporting with the standards of due process as guaranteed by the Fifth Amendment to the Constitution. E.g., United States v. Florida E. C. Ry., 410 U.S. 224 (1973); United States v. Illinois C. R. R., 291 U.S. 457 (1934); Atchison, T. & S. F. R. R. v. United States, 284 U.S. 248 (1932). Full and fair "hearings" are a fundamental requirement of the Interstate Commerce Act, and "where a hearing is denied by the Commission, or where the hearing granted is inadequate or manifestly unfair," then the Commission's order is void. I.C.C. v. Louisville & N. R. R., 227 U.S. 88, 91 (1913); Atchison, T. & S. F. R. R. v. United States, supra; Lang Transp. Corp. v. United States, 75 F.Supp. 915 (C.D. Calif. 1948).

BRAC asserts that although the Commission provided a hearing with respect to the proceedings against the application for permanent operating authority and against the temporary authorities, the hearing did not comport fully with the standards of due process.

A. The Commission Failed to Provide Petitioner with a Hearing Comporting Fully with the Standards of Due Process

Essential rights of a full and fair hearing include the reasonable opportunity not only to know the claims of the opposing party, but to meet those claims with counter evidence. United States v. Florida E. C. Ry., supra, 410 U.S. at 242 (1973); Golden Grain Macaroni Co. v. FTC, 472 F.2d 882 (9th Cir. 1972), cert. denied, 412 U.S. 918 (1973); National Trailer Convoy, Inc. v. United States, 293 F.Supp. 634 (N.D. Ok. 1968). As the Supreme Court has stated: "'The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one.'" United States v. Florida E. C. Ry., supra, 410 U.S. at 242, quoting Morgan v. United States, 203 U.S. 1, 18 (1938); see also, National Trailer Convoy, Inc. v. United States, supra, at 636. Accordingly, if an issue was not litigated, and the party proceeded against was not given an opportunity to defend himself, then an adverse finding on that issue by the agency violates due process. Golden Grain Macaroni Co. v. FTC, supra, at 886; ITT Continental Baking Co., Inc. v. FTC, 532 F.2d 207 (2nd Cir. 1976); NLRB v. Majestic Weaving Co., 355 F.2d 854 (2nd Cir. 1966); see also, Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 288n.4 (1974). (Due process clause forbids agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.)

In the instant case, BRAC contends that the Commission's dismissal of the application for permanent authority (Sub-No. 2345)(Part No. 181)

and the revocation of temporary authority (Sub-No. 2308 TA), to the extent it was revoked for "good cause", are invalid and void in that the Commission's decision was based on adverse findings as to unlitigated issues and, more importantly, was based on matters as to which REA did not have the opportunity to introduce evidence.

At the hearing, Administrative Law Judge Beddow [hereinafter, "ALJ"] ruled that issues regarding public convenience and necessity, REA fitness and capability, and the related issues of immediate and urgent need for such service would not be considered with respect to the petition to dismiss REA's application and to cancel REA's temporary authority. (Tr. 346, 648.)

In response to REA counsel's repeated requests for definition of the issues so that proper evidence could be introduced, Judge Beddow stated:

> I would say that certainly insofar as the 2314 [temporary authority] or 2345 [application for permanent authority] proceeding, the issue on the merits of PC&N [public convenience and necessity] or fitness are not involved. The issues must be limited strictly to those that are raised in the petition. (Tr. 346, emphasis added.)

Again, later in the hearing Judge Beddow stated:

> I don't think it is necessary to go into aspects of public convenience and necessity, and the ability of the common carriers to meet that need. We are not going to try the HUB application, we are not going to try a PC&N application. (Tr. 648.)

As a result of the ALJ's rulings, the record is totally devoid of any evidence as to those issues: respondents limited their evidence to REXCO violations; petitioner limited its evidence strictly to issues in dispute in the proceedings.

However, in the report and order of November 17, 1976, the Commission dismissed the application for permanent authority basing two out of the three grounds for dismissal on adverse findings as to those very issues which the ALJ had found specifically not to be at issue:

> In MC-66562 (Sub-No. 2345)(Part No. 181), we find that applicant REA Express, Inc., [1] has failed to prosecute its application in a timely manner[3]; [2] that applicant is not shown to be capable of prosecuting the application; [and 3] that attempted prosecution of the application would not appear likely to result in a feasible operation consistent with the public interest and the national transportation policy or required by the public convenience and necessity such that any appropriate authority would be issued as a result of such prosecution . . . . Report and Order, pp. 22-23, emphasis added.

Likewise, in finding good cause to revoke REA's temporary authority in No. MC-66562 (Sub-No. 2308 TA) three of the four grounds for good cause consisted of adverse findings with respect to non-litigated issues:

> First, we observe that the fitness and ability of a carrier to conduct operations under temporary authority always is a matter of special concern. [1] We believe the record herein shows that REA has absolutely no operational capability to perform any express service under the scope of the involved "Hub System" temporary authority. [2] Moreover, the performance, under the apparent approval and direction of the Trustee in bankruptcy of the improper operations discussed above, shows that REA, as it now exists, is not fit to conduct proper and safe operations. [3] Next, we again note that the feasibility of any proper operations under the "Hub System" have been shown to be impractical. [4] Finally, we conclude that the use of the "Hub System" authority by the Rexco Division has caused a significant diversion of traffic (approximately 6,000

3/ It should be noted that as a consequence of filing bankruptcy on February 18, 1975, REA was transformed into a new juridical entity. As a "new person" with all previous debts and agreements wiped out, REA did not have to recognize even such matters as collective bargaining agreements. (See, BRAC v. REA Express, 523 F.2d 164 (2nd Cir.), cert. denied, 423 U.S. 1017 (1975).) Analogously, BRAC contends that for the purpose of determining "timeliness", such computation must begin as of February 18, 1975.

> shipments up to May, 1976), and revenue from the Nation's regulated motor carrier industry (traffic that has had nothing to do with REA's traditional small parcel express service), and that to continue to allow such diversions would be inconsistent with the Commission's duty to promote and foster sound economic conditions in transportation under the National Transportation Policy. Report and Order, p. 21, emphasis added.

The Commission in basing its action on findings with respect to issues as to fitness and capability of the carrier, public convenience and necessity, and feasibility of any operations, as well as finding "good cause", clearly went beyond the issues as framed by the petition. ATA in its petition restricted allegations to lack of action, lack of prosecution, and failure to meet the requirements of Rule 247(f) of the Special Rules Governing application for Operating Authority allegedly contemplating the prompt prosecution of such applications. ATA Petition, pp. 6-7; see also Exhibit 13, p. 5. "Good cause" was never alleged by ATA as grounds for revocation of the temporary authority.

Consequently, the Commission's finding of "good cause" for revocation of the temporary authority and its findings with respect to public convenience, necessity, carrier fitness and capability, not only involved findings with respect to non-litigated issues to which REA did not have the opportunity to introduce evidence, but were also findings with respect to issues beyond those raised in the ATA petition.

The Commission's decision dismissing petitioner's application, and the Commission's finding of good cause for revoking the temporary authority should be held invalid and void as a violation of petitioner's right to due process, as guaranteed by the Fifth Amendment to the Constitution.

B. The Commission Failed to Comply with Its Statutory Duty Under the National Transportation Policy

A creature of statute, the Commission is an agency of limited powers and authority, bound by the mandates of Congress. United States v. Pennsylvania R. R., 242 U.S. 208 (1916); Rock Island Motor Transit Co. v. United States, 90 F.Supp. 516 (N.D. Ill. 1950), reversed on other grounds, 340 U.S. 419 (1951). The National Transportation Policy, as stated in 49 U.S.C. preceding §1 (54 Stat. 899), imposes certain duties upon the Commission in its administration of the Interstate Commerce Act. These duties are mandatory upon the Commission and failure to comply could result in a reversal of the Commission's action. See Schaffer Transportation Co. v. United States, 355 U.S. 83 (1957); O-J Transport Co. v. United States, 356 F.2d 126 (6th Cir. 1976); Trans-American Van Service, Inc. v. United States, 421 F.Supp. 308 (N.D. Tex. 1976). As the Supreme Court stated in Schaffer Transportation, supra, at 87-88:

> The National Transportation Policy, formulated by Congress, specifies in its terms that it is to govern the Commission in the administration and enforcement of all provisions of the Act, and this Court has made it clear that this policy is the yardstick by which the correctness of the Commission's actions will be measured.

The existence of such a duty by the Commission to act consistent with the National Transportation Policy has been specifically cited by the Commission at least twice in its opinion and order of November 17, 1976. However, the Commission failed to take into account, consider and weigh one of the most important factors of the National Transportation Policy. That Policy specifically recognizes and refers to the interests of employees of carriers by providing in pertinent part as follows:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; . . . to encourage fair wages and equitable working conditions; --all to the end of developing, coordinating, and preserving a national transportation system . . . adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy. 49 U.S.C. preceding §1.

This interest of employees is reflected in numerous other provisions of the Interstate Commerce Act, such as Section 17(11), which provides for the representatives of carrier employees to intervene and be heard in cases arising under the statute and in numerous Commission proceedings under the statute. Nowhere does the Commission's decision of November 17, 1976, even mention the interest of employees of REA in the operation involved, much less take that interest into account and consider it with respect to the Commission's order. Nor did it do so in its order of January 27, 1977, after the problem was called to its attention by BRAC.[4/]

In Schaffer Transportation Co., supra, the Supreme Court reversed and remanded a determination by the ICC denying a motor carrier's application for new service in an area already served by various railroad companies; the Court held that the ICC's failure to also evaluate the "inherent advantages" of the proposed service, as required by the National

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4/ The Commission did, in its order of January 27, 1977, attempt to finesse its statutory duty by stating that even if the arguments tendered were considered they would not warrant a different result. However, this smacks of simply a protective sentence placed therein by an order writer and not of serious consideration by the Commission since it did not refer to the National Transportation Policy and make any specific findings with respect thereto.

Transportation Policy, was a violation of the Commission's statutory duty. Analogously, the Commission's failure to consider employee interests in the instant case, as required by the National Transportation Policy, constitutes a violation of the Commission's statutory duty, and necessitates a reversal of the order. The Commission's failure is substantial and serious because, as BRAC's petition for reconsideration shows, there are about 15,000 employees involved whose average age is approximately 55 years, whose working experience has been largely with REA, and whose chances for employment elsewhere are minimal.

BRAC does not argue that the National Transportation Policy is a set of "self-executing principles that inevitably point the way to a clear result in each case." Schaffer Transportation Co., supra, at 92-93. Clearly such principles overlap and may conflict; where this occurs, resolution is the task of the agency that is the expert in the field. Schaffer Transportation Co., supra, at 93. But, resolution of conflicting principles requires at the minimum, collecting and evaluating facts as to each criteria, as the Supreme Court indicated by its decision in Schaffer. Accordingly, in the instant case the Commission should have at least gathered facts with respect to employee interests involved where the Commission's failure to do so was brought to its attention in time for it to rectify the situation without the necessity of judicial intervention, and especially where, as here, such interests are so vitally concerned and threatened.

C. The Commission's Order Dismissing the REA Application for Permanent Authority and Revoking the REA Temporary Authority Constituted Arbitrary, Capricious Action and an Abuse of Discretion

The Administrative Procedure Act provides that the reviewing court shall set aside agency actions and conclusions that are: (1) "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or (2) "unsupported by substantial evidence." 5 U.S.C. §706(2)(A) and (E). These two provisions of the Administrative Procedure Act are separate standards of review. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 413 (1971); Trans-American Van Service, Inc. v. United States, 421 F.Supp. 308, 317 (N.D. Tex. 1976). Therefore, an agency's finding may reflect arbitrary and capricious action even though supported by substantial evidence. Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 284 (1974); Trans-American Van Service, Inc. v. United States, supra; Midwest Coast Transport, Inc. v. United States, 391 F.Supp. 1209 (D. S.D. 1975).

BRAC contends that the Commission's statutory failure to collect and to consider facts with respect to employee interests, and the Commission's making adverse findings as to non-litigated issues to which petitioner was not provided an opportunity to introduce evidence, constitutes arbitrary and capricious action as well as an abuse of discretion.[5/] Such action by the Commission violates petitioner's statutory rights under the National Transportation Policy, under the Administrative Procedure Act, as amended,

5/ It should also be noted that F. Ralph Nogg, transportation expert for REAEMCO, was prepared to introduce evidence as to public convenience and necessity, but was not allowed to do so because of Commission denial of its petition to intervene by order of January 27, 1977.

5 U.S.C. §551, et seq., and under the Due Process Clause of the Fifth Amendment to the Constitution.

Under the arbitrary and capricious standard, a reviewing court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . . [And] the agency must articulate a rational connection between the facts found and the choice made . . . ." Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., supra, at 285-86; Trans-American Van Service, Inc. v. United States, supra; Johnston's Fuel Liners, Inc. v. United States, 407 F.Supp. 1231 (D. Wyo. 1976). Accordingly, courts have ruled that failure to consider all relevant factors constitutes arbitrary, capricious action. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Sabin v. Butz, 515 F.2d 1061 (10th Cir. 1975); Johnston's Fuel Liners, Inc. v. United States, supra.

Likewise, the Supreme Court has stated that discretion does not mean unfettered judgment alone, but judgment guided by sound standards and legal principles. Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975). Failure to collect the necessary facts constitutes an abuse of discretion. Xytex Corp. v. Schliemann, 382 F.Supp. 50 (D. Col. 1974).

In the instant case, BRAC contends that the Commission violated its statutory duty by failing to consider employee interests either sua sponte or after BRAC's request. Consideration of such interests naturally requires collection of facts with respect to those interests. The failure to collect and to consider such facts in itself constitutes arbitrary and capricious action, and an abuse of discretion.

Under the circumstances of the instant case, there can be no doubt that employee interests are relevant to the final actions of the Commission. Dismissal of the REA application for permanent authority and revocation of the REA temporary authority involve the imposition of a severe penalty affecting the principal remaining asset of a bankrupt and thereby destroying not only any chance of recovery or reemployment by the employees, but also the chance of the Trustee to realize on that asset for the estate and the benefit of creditors of which the employees are priority creditors.

Likewise, failure to collect and to consider all relevant facts and criteria precludes exercise of sound judgment and articulation of a rational basis for the Commission's decision. The record is devoid of any facts concerning employee interests; the Commission's report and order of November 17, 1976, and of January 27, 1977, make no mention of employee interests. Accordingly, the order should be held invalid and void with respect to the dismissal of the REA permanent authority application and the revocation of the temporary authority.

II

The Commission Violated Petitioner REA's Statutory Rights Under 5 U.S.C. §558 By Failing To Provide REA With Prior Notice Of Violations And The Opportunity To Comply Therewith Before Commencing Revocation Proceedings Against REA's Temporary Authority

Dismissal of REA's application for permanent authority, BRAC respectfully submits, was invalid because of the various due process violations as argued in Argument I above. The only ground for cancellation and revocation of the temporary authority, as presented in the ATA petition,

was the requested dismissal of the permanent authority application. Accordingly, if the application was improperly dismissed, then the temporary authority has not terminated by its own terms (being contingent upon pendency of the application). As such, the REA temporary authority is still viable and may not be revoked on any other grounds unless done so in compliance with 5 U.S.C. §558, which reads in pertinent part as follows:

> . . .Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given --
>
> (1) notice by the agency in writing of the facts which may warrant the action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements. 5 U.S.C. §558(c).

The Commission did not comply with the requirement of prior notice and opportunity to rectify; and it is respectfully submitted that the Commission must have complied with that requirement before it could have revoked the REA authority at issue in this proceeding.

A. Temporary Authorities Constitute "License" within the Meaning as Contemplated by the Administrative Procedures Act

In the instant case, the Commission held that 5 U.S.C. §558(c) prior notice procedures were not applicable to the revocation of temporary authority. Predicating this decision was the Commission's determination that a temporary authority does not constitute a "license" as that term is used in the second sentence of §9(b) of the Administrative Procedures Act [hereinafter, "APA"], 5 U.S.C. §558(c), and consequently REA's temporary

authority was exempt from those provisions. Order of January 27, 1977, p. 5. In support of that position, the Commission cited Great Lakes Airlines v. CAB, 294 F.2d 217 (D.C. Cir.), cert. denied, 366 U.S. 965 (1961). Order, supra, at p. 5.

However, BRAC contends that the Commission's conclusion exempting temporary authorities from 5 U.S.C. §558(c) procedures is erroneous. In relying upon an alternative holding in Great Lakes, the Commission failed to recognize the due process underpinnings of Section 9(b)'s prior notice provisions, and it failed to consider developments in the meaning of "license" as used in Section 9(b) as set forth in Pan-Atlantic S. S. Corp. v. Atlantic Coast Line Ry., 353 U.S. 436 (1957), and Bowen Transports, Inc. v. United States, 116 F.Supp. 115 (E.D. Ill. 1953).

In Pan-Atlantic, supra, the Court faced the question as to whether the last sentence of Section 9(b), 5 U.S.C. §558(c), authorized the Commission to extend a temporary authority granted under the Interstate Commerce Act for more than 180 days.[6/] The Supreme Court, in affirming the Commission's authority to extend a temporary authority beyond the 180 days set forth in Section 311(a) of the Interstate Commerce Act, held that a temporary authority constitutes a "permit or certificate" within the APA's definition of "license" (5 U.S.C. §551(e)) and therefore "licensee", as

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6/ That sentence provides:

> In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

used in Section 9(b) would have to include one who holds a temporary authority. As the Supreme Court stated: "It is argued that 'license' in that section [5 U.S.C. §558(c)] includes only those that are permanent. But we see no justification for that narrow reading." Pan-Atlantic, supra, at 439.

Since APA §2(e) definitions (5 U.S.C. §551) were obviously intended by Congress to assure uniform interpretation of the defined terms throughout the Act, the Supreme Court's holding in Pan-Atlantic, supra, requires that the second sentence of Section 9(b) be applicable to temporary authorities.

Such a conclusion is buttressed by the District Court's holding in Bowen Transports, supra. In that case the carrier brought at action to restrain enforcement of an ICC order denying temporary authority. The carrier had been granted temporary authority by a single commissioner, subject to being affirmed or reversed on reconsideration by the Commission. Before the grant of authority became final, it was appealed to the Commission which on reconsideration reversed and revoked the grant. The Court held that Section 9(b) procedures were not available to the revocation of temporary authorities that were not yet final. The natural implication of the Bowen Transports holding is that Section 9(b) procedures would have applied to the revocation of temporary authorities were the grant of temporary authority final.

In the instant case, the grant of temporary authority was final. Accordingly, under the rationale of Pan-Atlantic and Bowen Transports, REA should be entitled to all the procedures accorded by Section 9(b) prior to

commencement of proceedings resulting in revocation of the temporary authority.

Although respondents assert otherwise, Great Lakes Airlines, supra, does not bar the consideration of temporary authorities as "licenses" as defined and used in the APA. Great Lakes involved carriers' petition to review the Board's denial of the carriers' applications for final authority and the expiration of the interim temporary authorities. However, in Great Lakes the temporary authorities were not revoked but, rather, allowed to expire by their own terms when the Board denied the pending applications for permanent authority. The Court held that Section 9(b) protections did not apply since the temporary authorities were not "withdrawn, suspended, revoked or annulled" but expired by their own terms. 294 F.2d at 222. Nor were the temporary authorities revoked as "punishment" for past conduct. Id. at 223. Alternatively, the Court concluded, based upon its interpretation of the scant legislative history of Section 9(b) of the APA, that Congress intended temporary authorities to be exempt from Section 9(b) provisions. Id. at 223. For example, the Court relied upon the Attorney General's letter appended to the Senate Report commenting on Section 9(b):

> Subsection (b) is intended to codify the best existing law and practice. The second sentence of subsection (b) is not intended to apply to temporary licenses which may be issued pending the determination of applications for licenses. S. Rep. No. 752, 79th Cong., 1st Sess. (1945), Administrative Procedures Act, Legislative History 229, emphasis added.

Judge Fahy disagreed with the majority and in his dissent in Great Lakes indicated that the carrier should be entitled to Section 9(b) protections

with regard to the revocation of the temporary authorities if the grounds for denial of the application were based on past violations and the temporary authorities were in effect being "revoked" as punishment. Id. at 227-28.

What the Great Lakes majority failed to recognize when it relied upon the legislative history to narrow the protections of Section 9(b) was that prior law had developed on the formalistic distinction between "rights" and "privileges" in determining when an individual's interests were entitled to due process protections. Since Section 9(b) codifies due process requirements, under prior law, privileges such as temporary authorities were not entitled to such due process protections. However, the prior law distinction between rights and privileges has now been unequivocally rejected. As the Supreme Court has stated: "[T]he Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights." Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972). Temporary authorities, BRAC respectfully submits, constitute a "legitimate claim of entitlement" as granted by the Commission under 49 U.S.C. §310(a), which are entitled to due process protections and which cannot be revoked without compliance with the requirements of Section 9(b) of the APA. BRAC respectfully submits that there is no meaningful distinction for due process considerations between permanent authorities and temporary authorities, especially where, as in the case at bar, the temporary authority has been in existence and relied upon for more than eight years. Temporary and permanent license holders are equally in

need of protection from summary revocation. That protection, it is submitted, is mandated by due process.

B. Petitioner REA is Entitled to §558(c) Protections Prior to Commencement of Revocation Proceedings

Section 558(c), Title 5 of the United States Code, provides that before a license may be withdrawn, suspended, annulled or revoked, the Commission must: (1) provide written notice of the facts or conduct warranting the action, and (2) provide the opportunity for the party to demonstrate or to achieve compliance with "all legal requirements". Such action must be provided prior to commencement of agency proceedings against the party, absent "cases of willfulness, or those in which public health, interest, or safety requires otherwise." 5 U.S.C. §558(c).

In the instant case, petitioner REA and the public were not provided with written notice of any violations or other facts warranting revocation of the temporary authority for good cause prior to commencement of the proceedings resulting in the revocation of the temporary authorities. Service of a complaint -- an act initiating agency action -- is not notice prior to the institution of proceedings and ignores the language of Section 558(c). Written notice of charges does not meet that Section's requirements of affording a licensee an opportunity to avoid revocation proceedings by subsequent compliance since Section 558(c), it is submitted, rests on the policy that the public interest will best be served by informing the violator so that he may reform. See Note, 75 Harv. L. Rev. 383, 388 (1961). Nor was petitioner REA provided the opportunity to demonstrate or to achieve compliance with "all legal requirements" prior to commencement of the proceedings against it. Accordingly, the Commission's failure to afford

petitioner REA or the public with the due protections provided by 5 U.S.C. 558(c) violated petitioner REA's and the public's rights and thereby constitutes grounds for reversal of the Commission's order revoking the temporary authority for good cause. See, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., supra; Lang Transp. Corp. v. United States, supra.

C. Alleged "Willfulness" Should Not Bar Application of §558(c) Procedures

The Commission, in the instant case, did not revoke the temporary authority on the theory of willful violations which would dispense with the need of affording petitioner REA prior notice and opportunity for compliance as specified in 5 U.S.C. §558(c). See, Report and Order of November 17, 1976, at 20-23. Rather, the Commission revoked the temporary authority for "good cause" under 49 U.S.C. §310(a). Id. at 21, 22-23. Not until the order of January 27, 1977, denying petitions for intervention, reconsideration and rehearing did the Commission suggest "willfulness" as a ground for the revocation. Order of January 27, 1977, at 5.

Although the Commission now contends that since the alleged violations were "willful," petitioners cannot complain of Commission failure to comply with Section 558(c), BRAC respectfully suggests that such a finding is suspect since the Commission found willfulness only after the hearing had been concluded and the Commission was justifying its actions. It is respectfully submitted that since the ICC did not proceed initially on a theory of willfulness, the type of procedure required by §558(c) for

non-willful violations is necessary to support a revocation of REA's license. Accord, Great Lakes Airlines, Inc. v. CAB, supra, at 229 (Dissent). As Judge Fahy said: "To revoke on the basis of violations, never previously specified, found on evidence of a general character taken in the course of the investigation, is inconsistent with the plain purport, if not the specific language, of section 9(b)." Id.; see also, NLRB v. Majestic Weaving Co., 355 F.2d 854 (2nd Cir. 1966). The Commission's post hoc finding of willfulness should not be allowed to operate as an ex post facto excuse for its failure to provide, and to comply with, the statutory requirements of 5 U.S.C. §558(c).

III

The Commission's Decision Dismissing The Application For Permanent Authority And Revoking The Temporary Authority Should Be Held Invalid And Void As Constituting An Impermissible Penalty, Unjust And Unreasonable In Consequence

Under the National Transportation Policy as enunciated in the Interstate Commerce Act, 49 U.S.C. preceding §1, the Commission is charged with the administration and enforcement of remedial legislation. Kaplan Trucking Co. -- Investigation of Control, 93 M.C.C. 167, 171 (1963); see also, Gilbertville Trucking v. United States, 371 U.S. 115 (1962). Choice of remedy, it is submitted, is as important as a finding of violation; accordingly, the Commission bears the heavy responsibility of tailoring its remedy to particular facts of each case so as to best effectuate the remedial objectives of the legislation it is called upon to administer. Gilbertville Trucking v. United States, supra, at 130; Kaplan Trucking, supra, at 171. As the Supreme Court stated in Gilbertville Trucking:

"[T]he Commission's power is corrective, not punitive. The justification for the remedy is the removal of the violation." 371 U.S. at 129-30. Failure to appropriately tailor the remedy to the problem before it could result in reversal of the Commission's order. See, Gilbertville Trucking, supra.

Gilbertville Trucking involved an unlawful acquisition by a carrier and the Commission's imposition of a divestiture order as remedy. The Supreme Court reversed and remanded the divestiture order on the grounds that in the absence of a showing on the record of evidence that the parties were heard on the issue and that the proper standards were applied, the Court was precluded from finding that the Commission had made an allowable judgment as to penalty. 371 U.S. at 130. Moreover, the evidence indicated that alleged violations could conceivably be discontinued without divestitute. 371 U.S. at 131.

Analogously, in the case at bar the Commission's dismissal of petitioner REA's application for permanent authority and its revocation of the temporary authority constitutes punitive, not remedial, action. As in Gilbertville Trucking, the Commission's judgment cannot be supported by evidence in the record because the underlying issues supporting the Commission's findings were not litigated and were, in fact, beyond the issues framed in the ATA petition. Likewise, the Commission failed to apply all the proper standards in reaching its judgment, having failed to consider employee interests as statutorially required.

A cease and desist order sufficiently removed and remedied the alleged violations. In fact, the alleged violations occurred in a division of REA

whose operations were only a small portion of REA's total express service operations. Tr. 2283-84. REXCO accounted for less than three-tenths of one percent of REA's entire shipment volume. REA Reply Brief before the ICC, pp. 28-29. Likewise, all alleged violations were stopped voluntarily and promptly by REA upon receipt of the report and order of November 17, 1976, and prior to the effective date of that order. The REA embargo continues to this date.

The Commission's dismissal of REA's application, and especially the revocation of REA's temporary authority, goes well beyond that which was necessary to remedy the alleged violations. Such action by the Commission fails to consider the impact upon: (1) the Trustee's ability to provide "express service"; (2) the shippers who relied on REA's service as provided by the REXCO Division; (3) Alltrans Express U.S.A., Inc., as successor-in-interest applicant in Docket No. MC-F-13003; (5) possible reorganization of REA under Chapter X proceedings; and (6) more importantly, the impact upon REA's numerous priority creditors/employees.

The Commission's order of November 17, 1976, and its reaffirmance of January 27, 1977, destroys completely any possibility of reorganization of REA under Chapter X or the rejuvenation of an express operation which could employ many of those now unemployed former employees who are priority creditors of REA.

Under the circumstances of this case, especially where thousands of former and current employees are so adversely affected, there can be no adequate rationale justifying the Commission's imposition of a penalty with such far-sweeping consequences and devastation. Nor can the Commission point to the

record for evidence that such penalty is in the public interest; no evidence was taken as to public convenience and necessity or immediate and urgent need. Tr. 346, 648. Accordingly, the Commission's decision to dismiss the application and to revoke the temporary authority should be held as invalid for constituting an impermissable penalty, too unjust and unreasonable in consequence.

CONCLUSION

Intervenor BRAC respectfully submits that because of the various due process and statutory violations as detailed above, the Commission's order dismissing REA's application for permanent authority and revoking REA's temporary authority should be set aside and this proceeding remanded to the Commission for appropriate disposition.

Respectfully submitted,

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February 25, 1977

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 76-4278

REA EXPRESS, INC., BANKRUPT,
C. ORVIS SOWERWINE, TRUSTEE IN
BANKRUPTCY,

Petitioners,

BROTHERHOOD OF RAILWAY, AIRLINE AND
STEAMSHIP CLERKS, FREIGHT HANDLERS,
EXPRESS AND STATION EMPLOYES,

Intervenor,

v.

UNITED STATES AND INTERSTATE COMMERCE
COMMISSION,

Respondents.

On Petition To Review Orders Of The Inter-
state Commerce Commission

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the Brief of Intervenor Brotherhood of Railway and Airline Clerks upon all parties of record in the above-captioned case by mailing two copies thereof, properly addressed, with first-class postage prepaid, to the following:

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